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No. 08-1515

IN THE

Supreme Court of the United States

GOLDEN GATE RESTAURANT ASSOCIATION,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

SAN FRANCISCO CENTRAL LABOR COUNCIL, *et al.*,
Intervenors/Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether ERISA section 514(a), 29 U.S.C. § 1144(a), preempts local laws mandating ongoing employer contributions for employee health benefits, or alternative payments to a local government, and extensive recordkeeping and reporting and disclosure requirements, a question on which the courts of appeals are in conflict.

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SUPPLEMENTAL BRIEF OF PETITIONER

In accordance with Supreme Court Rule 15.8, Petitioner respectfully submits this Supplemental Brief to bring to the Court's attention new legislation – the Patient Protection and Affordable Care Act, signed into law on March 23, 2010[1] and amended on March 30, 2010[2] (the "PPACA") – that undermines one of the grounds on which Respondent opposes the Petition.

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[1] Pub. L. No. 111-148, 124 Stat. 119.

[2] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

We also alert the Court to the fact that its reasoning last month in *Conkright v. Frommert,* 130 S. Ct. 1640 (2010), applies with equal force to this case and implicitly rejects Respondent's position that the Ordinance can be harmonized with this Court's ERISA preemption cases.

I. THE FINAL FORM OF FEDERAL HEALTH CARE LEGISLATION UNDERMINES, IN PART, RESPONDENT'S OPPOSITION TO THE PETITION.

Respondent's Opposition Brief argues that "the serious possibility that federal legislation will moot the ERISA preemption issue in this case weighs heavily against the Court granting certiorari now." Opposition at 10; *see also id.* at 39 ("[T]he question presented by the petition may be mooted by national health care reform, so granting certiorari would not be a good use of the Court's resources."). According to Respondent, because federal legislation "would include a national employer mandate . . . it would be that new law, not ERISA, that preempts the City's health care spending requirement." *Id.* The PPACA, however, proves otherwise.[3]

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[3] The Mayor and Director of the Department of Health of San Francisco apparently no longer agree that the city's health care ordinance is rendered moot by the new federal law. Twice since Respondent filed its opposition brief, one or both of these top city officials have publicly stated that federal health care reform legislation would not render superfluous San Francisco's health care program created by the Ordinance. *See* Heather Knight, *Healthy San Francisco Expected To Continue,* S.F. Chron., Mar. 23, 2010, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/03/23/MN4V1CJO00.DTL ("When San Francisco launched its first-of-its-kind universal health care program in the summer of 2007, city officials said they hoped

Set forth in ten titles across 906 pages, the PPACA unquestionably is large and, in places, complex. But as relevant to the question presented in this case, the new law is straightforward. Title I of the PPACA contains the provisions that bear directly on the PPACA mootness issue raised by Respondent.[4] Within title I, the new law does two things that matter: (1) it enacts a new employer mandate in the form of an excise tax, which has little preemptive force, and (2) it amends ERISA (by adding new minimum federal standards for health care coverage) without altering existing ERISA preemption rules. It additionally

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the program would someday be irrelevant because the federal government would provide health care for all. But on Monday, Mayor Gavin Newsome and Public Health Chief Mitch Katz said they are dedicated to ensuring the viability of Healthy San Francisco because major holes in the national plan, if signed into law, will leave out thousands of local residents."); Victoria Colliver, *National Plan Wouldn't Mean End of Healthy S.F.*, S.F. Chron., Nov. 23, 2009, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/11/23/MNC31ALDNM.DTL ("'Since there are all these versions of these bills, none of which have passed, it's hard to say anything other than I know Healthy San Francisco is still going to be needed,' said Dr. Mitch Katz, director of the San Francisco Department of Public Health.").

[4] Some of the relevant provisions of title I of the PPACA were modified in title X of the PPACA (by section 10101). To spare readers the burden of flipping between different titles and between Public Law Nos. 111-148 and 111-152 merely to ascertain the final text of given provisions, the House Office of the Legislative Counsel created a document that consolidates and integrates into a single text all of the original and amending provisions of Public Law Nos. 111-148 and 111-152. It is available at http://www.ncsl.org/documents/health/ppaca-consolidated.pdf. That document allows readers of title I, for example, to see the provisions of that title, as modified by title X (and by Public Law No. 111-152), in their final and fully revised form in one place.

fails to do something at least as important: it does not exempt state and local "play or pay" laws from ERISA preemption. Because the PPACA neither preempts state and local "play or pay" laws nor exempts them from ERISA's preemption regime, its net effect is to leave the question presented in this case intact and still in urgent need of decision by this Court.

The Mandate. The PPACA's employer mandate does not preempt the San Francisco Ordinance. Congress wrote the federal mandate in the form of a new excise tax on "large employers" (those with 50 or more employees) that do not provide minimum health care coverage to employees. *See* PPACA § 1513 (adding new 26 U.S.C. § 4980H).[5] Under the PPACA, this tax preempts only those state laws that would "prevent [its] application." *See* PPACA § 1321(d) ("NO INTERFERENCE WITH STATE REGULATORY AUTHORITY.– Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title."). The San Francisco Ordinance's mandate, for all its fatal defects under ERISA (as discussed in the Petition and Reply), does not contradict, or "prevent the application of," the PPACA's new federal employer mandate, and therefore is not preempted by it.

Other state laws, by contrast, appear to contradict the new PPACA mandate and, to the extent they do so, are preempted by it. For example, a proposed amendment to Arizona's state constitution appears

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[5] Citations to the new law in this brief are in the form of "PPACA § __," based on the consolidated legislative text set forth in the document created by the House Office of the Legislative Counsel discussed in note 4, *supra*.

aimed squarely at the PPACA's employer mandate and its parallel individual mandate.[6] The proposed Arizona amendment provides that "[a] law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system," and that a "person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services." H. Con. Res. 2014, 49th Leg., 1st Reg. Sess. (Ariz. 2009) (as transmitted to the Ariz. Secretary of State on July 7, 2009, and to be submitted to voters at the next general election as provided by Ariz. Const. art. XXI). If adopted, this state law, by all appearances, would directly obstruct the new mandates and, to that extent, be preempted by PPACA § 1321(d).

Virginia passed a similar law on March 10, 2010, apparently calculated to defeat the PPACA's individual mandate within the state. The Virginia law provides that "[n]o resident . . . shall be required to obtain or maintain a policy of individual coverage" and that "[n]o provision of this title shall render a resident . . . liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage." Va. Code Ann. § 38.2-3430.1:1 (2010). If given effect, the Virginia and Arizona provisions would appear to thwart the PPACA's employer and individual mandates, and thus fall within section 1321(d)'s sights.

State and local laws running the other way, like San Francisco's employer contribution requirement,

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[6] Congress included a new excise tax on individuals who fail to maintain "minimum essential coverage." *See* PPACA § 1501(b) (adding new 26 U.S.C. § 5000A).

which do not authorize that which the PPACA prohibits or prohibit that which the PPACA authorizes, do not "prevent the application" of the PPACA and therefore are not preempted by it.[7]

Minimum Standards. The PPACA's amendment of ERISA to add new minimum federal coverage standards for group health plans further undermines Respondent's argument that adoption of federal health reform would "weigh[] heavily" against granting the Petition.

The PPACA codifies new minimum coverage standards (which include such things as a prohibition against imposing annual or lifetime coverage limits and a requirement that preventive health services be covered without cost-sharing requirements) in two places. It first adds them to title XXVII of the Public Health Service Act ("PHSA"). *See* PPACA § 1001 (adding and amending various provisions of title XXVII of PHSA); *see also* 42 U.S.C. §§ 300gg to 300gg-92 (setting forth title XXVII of PHSA). It then adds them to ERISA by enacting a new ERISA section 715 (29 U.S.C. § 1185d) that simply incorporates by reference the relevant PHSA provisions. *See* PPACA § 1562(e) (adding section 715 to ERISA) (to be codified at 29 U.S.C. § 1185d).[8]

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[7] *Cf. MMA Ins. Co. v. Blue Cross & Blue Shield of Kansas, Inc.*, 552 F. Supp. 2d 1250, 1255-57 (D. Kan. 2004) (interpreting Public Health Services Act provision that expressly preempts state health insurance laws to the extent they "prevent[] the application of a requirement of this part," and finding state law preempted where its application would authorize a party to do exactly that which PHSA prohibits).

[8] Because these new standards are codified in part 7 of subtitle B of title I of ERISA, they are governed by special ERISA preemption rules set forth in 29 U.S.C. § 1191. That section

The PPACA effects this amendment without altering ERISA's existing preemption rules. It neither exempts state or local "play or pay" laws from ERISA preemption, nor does it expressly provide for their preemption by ERISA. The PPACA, therefore, is neutral on ERISA preemption of state and local "play or pay" laws. Contrary to Respondent's position, that leaves ERISA preemption front and center in this case.

II. THE ERISA PRINCIPLES ON WHICH THIS COURT DECIDED *CONKRIGHT v. FROMMERT* LAST MONTH SUPPORT GRANTING THE PETITION.

Respondent separately opposes the Petition on the ground that the Ninth Circuit's decision in this case "is consistent with this Court's ERISA preemption rulings." Opposition Brief at 24. In support, Respondent argues that ERISA's goals of national uniformity in plan administration and predictability across jurisdictional lines of legal outcomes, two points the Petition emphasized strongly,[9] are not meaningfully impaired by benefit mandates like the Ordinance. Opposition Brief at 27-29. This Court's reasoning last month in another ERISA case, however, implicitly rejects Respondent's argument and echoes points made in the Petition.

In *Conkright v. Frommert,* the Court held that an employee benefit plan administrator with discretionary authority to interpret the plan does not lose

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modifies the ERISA preemption rule that ordinarily would apply to state insurance laws touching on minimum coverage standards but otherwise expressly makes ERISA's general preemption provision, 29 U.S.C. § 1144, applicable.

[9] *See, e.g.,* Petition at 22.

Firestone[10] deference when exercising that discretion because of a prior honest mistake in plan interpretation. Although the Court ordinarily would have relied on trust law principles to decide a case like *Conkright*, those principles proved unavailing. So the Court looked to "the guiding principles we have identified underlying ERISA" to decide the case. *Conkright*, 130 S. Ct. at 1648.

ERISA's guiding principles, the Court held, are uniformity in legal standards governing plans, predictability in plan liabilities, and efficiency in plan administration. *Id.* at 1648-51. In articulating these principles, the Court emphasized that Congress sought to encourage employers to create benefit plans and "'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" *Id.* at 1649 (citation omitted). "*Firestone* deference serves the interest in uniformity," the Court held, by "helping avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions – a result that 'would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.'" *Id.* (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)).

This reasoning supports the Petition and undermines the Opposition. As we explained in the Petition, state and local laws like the Ordinance ultimately would drive the structuring of benefits in employer-sponsored plans and, in doing so, com-

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[10] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

pletely undermine national uniformity in plan administration and confidence that plan provisions are legal from one jurisdiction to another. *E.g.*, Petition at 7, 22, 23-34 (citing among other cases *Egelhoff v. Egelhoff,* 532 U.S. 141, 148 (2001)).

Respondent disagrees with Petitioner's reading of *Egelhoff,* arguing that *Egelhoff* held that a Washington statute regulating entitlement to survivor benefits under ERISA plans was preempted only because the statute required plan administrators and sponsors to ignore their plans or amend them to conform to Washington law, and it was only to that extent that the state law was held to have interfered with ERISA uniformity. Opposition Brief at 28-29. But the Court in *Conkright* saw a broader principle of uniformity at work in *Egelhoff*: "Thus, failing to defer to the Plan Administrator here could well cause the Plan to be subject to different interpretations in California and New York. 'Uniformity is impossible, however, if plans are subject to different legal obligations in different states.'" *Conkright,* 130 S. Ct. at 1651 (quoting *Egelhoff,* 532 U.S. at 148). Under *Conkright*, the possibility that plans would be subject to different legal rules in different jurisdictions was enough to offend ERISA's uniformity principle.

Conkright thus implicitly rejects the City's position that the Ordinance does not offend core ERISA values of national uniformity and predictability of plan governance rules. It therefore affirms the urgent need for the Court to grant the Petition.

Respectfully submitted,

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